

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN J. McCARTHY, :
Petitioner :
vs. : CIVIL NO. 1:CV-10-1673
: :
WARDEN USP LEWISBURG, :
Respondent :
:

O R D E R

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

We are considering Magistrate Judge Smyser's Report and Recommendation, recommending we dismiss John J. McCarthy's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Petitioner objects to the report, arguing his petition is not barred by 28 U.S.C. § 2244 and that Judge Smyser improperly raised the section 2244 issue *sua sponte*. Since objections were filed, the Court must "make a *de novo* determination of those portions of the report or specified proposed finding or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(c).

We are not convinced by the petitioner's arguments. In a thorough and thoughtful report, Judge Smyser correctly found that McCarthy's petition was barred by section 2244. In addition, petitioner was not prejudiced by Judge Smyser's decision to raise this issue *sua sponte* because he placed McCarthy on notice and gave him time to respond. We see no reason for further comment because our reasoning mirrors that of the magistrate judge.

ACCORDINGLY, this 7th day of February, 2011 it is ordered that upon consideration of the report and recommendation of the magistrate judge (doc. 17), filed December 8, 2010, to which objections were filed, and upon independent review of the record, it is ordered that:

1. The magistrate judge's report is adopted.
2. Plaintiff's objections (doc. 18) are overruled.
3. Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 is dismissed pursuant to 28 U.S.C. § 2244.
4. The Clerk of Court shall close this file.

/s/William W. Caldwell
William W. Caldwell
United States District Judge